No. 96-1985

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WILLIAM SNOW HUME,
Petitioner
VS.
W. J. WALLIS, MICHAEL C. MAYNARD,
JAMES DON BANKHEAD, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Supreme Court's "exceptional circumstances" test for abstention or stay as announced in *Colorado River Water Conservation District* and *Moses H. Cone Memorial Hospital*, it is error or an abuse of discretion for a federal district court to completely fail to address the "fifth factor," namely, the effect of the presence of federal issues and claims in the federal case upon the federal court's obligation to hear the case.

2. Whether a federal district court errs in abstaining or imposing a stay under the aforementioned *Colorado River* doctrine over a case or cause of action thereof, when it has already found facts that should deprive it of jurisdiction over such case or cause of action.

3. Whether a federal district court, before it may abstain or impose a stay under the aforementioned *Colorado River* doctrine over a case, must first make a finding that the subject state and federal cases are truly "parallel" or "concurrent" in the sense of identity of parties, claims and issues.

4. Whether a federal district court may, under the aforementioned *Colorado River* doctrine, abstain or impose a stay over a federal cause of action under 42 U.S.C. § 1983, where the federal plaintiff has prevented claim preclusion by reserving all of his or her federal claims for the federal court, pursuant to the procedure announced by the Supreme Court in *England v. Louisiana State Bd. of Medical Examiners*, and the federal cause of action, because of state procedural law, cannot suffer issue preclusion.

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM SNOW HUME, *Petitioner*

v.

W. J. WALLIS, MICHAEL C. MAYNARD, JAMES DON BANKHEAD, *ET AL., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William Snow Hume respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the district court and of the court of appeals are unreported.

JURISDICTION

The court of appeals entered its judgment on March 17, 1997 (App.F, pages 1-5, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

LEGISLATION INVOLVED

None. This case concerns judicially announced doctrines of abstention and stay.

LIST OF PARTIES

The two principal defendants, alleged to be official actors and appearing above on the caption, include Fullerton Police Officer W. J. WALLIS and Fullerton Police Sergeant MICHAEL C. MAYNARD.

Secondary defendant JAMES DON BANKHEAD, sometime Fullerton City Councilmember, also is alleged to be an official actor and also appears on the caption. The remaining secondary defendants, alleged to all be private actors, include WILLIAM PETER GODFREY, JAN FLORY AKA JANESSE BORIS, DENNIS CHAPMAN, UNOCAL LAND AND DEVELOPMENT COMPANY, BILL FLORY, DARRYL WOODS, Union Oil Company of California, misdenominated on the Complaint by Petitioner as UNOCAL CORPORATION, and DOES ONE THROUGH 50.

STATEMENT OF THE CASE

This case began as a Complaint for Damages for federal civil rights violations, i.e., causes of action under 42 U.S.C. §1983, with some pendent state claims. The district court's subject matter jurisdiction over the federal claims is based upon 28 U.S.C. § 1348 and 28 U.S.C. § 1331, and its jurisdiction over the pendent state claims is based upon 28 U.S.C. §1367.

This petition concerns an order of stay imposed by the federal district court pending the resolution of one of two previously filed state civil cases involving some, but not all, of the parties to the federal case and involving some, but not all, of the factual and legal issues in the federal case. No federal causes of action or federal issues of any sort were ever pleaded in that state case. In imposing the stay, the district court purported to invoke the doctrines announced by the Supreme Court in *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976)(hereinafter, "*Colorado*

River"), and *Moses H. Cone Memorial Hospital v. Mercury Const.*, 460 U.S. 1 (1983)(hereinafter, "*Moses H. Cone*").

Because this petition concerns the jurisdictional and procedural implications of the interaction of the state and federal cases, the Statement of the Case will present in three parts the respective procedural histories of the two state court civil proceedings (part A), the federal district court proceeding (part B), and of the federal appellate proceeding (part C).

A. The Two Civil Proceedings Prior to the Instant Case

On October 3 or 4, 1994, principal defendant W. J. WALLIS executed and filed a criminal complaint against the Petitioner in the North Orange County Municipal Court[1]. A little more than a year later, after extensive pretrial discovery and litigation, the district attorney moved to dismiss the criminal proceeding in the interests of justice, and the municipal court dismissed the criminal case on October 17, 1995. (*See* paragraphs 26 and 27 of the Complaint in instant case, and Exhibit "B" thereto, at Excerpts of Record, Book I, pages 34-35, and pages 62-63.)

On November 2, 1995, Petitioner filed in the Orange County (California) Superior Court a complaint for two counts of malicious prosecution against the complaining witnesses, most of whom are named as secondary defendants in the instant case, namely, JAMES DON BANKHEAD, WILLIAM PETER GODFREY, JAN FLORY AKA JANESSE BORIS, DENNIS CHAPMAN, UNOCAL LAND AND DEVELOPMENT COMPANY, and BILL FLORY, in Case

[1] In California, criminal "complainants" are now usually law enforcement public officials. Alleged victims of crimes who press charges are usually called "complaining witnesses," as many of the secondary defendants will be called herein.

Number 755114. (Hereinafter, "*Hume v. Flory*".) Petitioner could not sue the principal defendants in the state case because, as he noted at paragraph 47 of the Complaint in the instant case, police "defendants MAYNARD [and] WALLIS... are... immune from actions under California law for malicious prosecution and abuse of process because of the provisions of Government Code sections 811.4 and 821.6." (*See* Excerpts of Record, Book I, pages 41-42.)

On January 4, 1996, Fullerton citizen Stuart STITCH filed a "Complaint for Declaratory Relief, Injunctive Relief, and Damages" against secondary defendant JAMES DON BANKHEAD and the City of Fullerton in *Stitch v. City of Fullerton, James Don Bankhead, Does 1-50*, Case Number 757801. (Hereinafter, "*Stitch v. Bankhead*".) This type of suit is known as a "taxpayer suit" and the purpose of such "taxpayer suits" is to prevent unlawful gifts of public money for private purposes. At paragraph 12 of his Complaint, STITCH alleges that "[n]othing in [HUME's] complaint alleges that Bankhead performed any action in his capacity as a Fullerton city councilman or otherwise did any act in his official capacity or in any other capacity for which he would be entitled to reimbursement from the City of Fullerton for his legal expenses... At the Fullerton city council meeting of December 5, 1995,... the city attorney announced that the council had decided to... reimburse Bankhead for his attorneys fees and costs and to provide him with a defense to the Hume action, because Bankhead had been on the city council at the time of the events alleged in the Hume action." (*See* App. A, page 4, *infra*.)

The Complaint in *Stitch v. Bankhead* also alleges at paragraph 14(E) that WILLIAM PETER GODFREY and JAN FLORY, who are secondary defendants in the instant federal case, "had a conflict of interest in voting [for] the payment of legal fees for Bankhead in [a] matter in which they were also

defendants, in that they had a direct financial interest in having the legal fees of a codefendant paid such that the legal work performed... would lessen the burden on them." (*See* App. A, page 5, *infra.*)

On February 6, 1996, Petitioner filed a "First Amended Complaint" in the state malicious prosecution action, namely *Hume v. Flory*. At paragraph 19 on page 8 of that amended complaint, Petitioner specifically pleaded that "[i]n causing the filing of the Complaint in the criminal case, defendant JAMES DON BANKHEAD **acted as a private citizen** and as a candidate for the office of city council, and **not in the course of his duties** as a member of the Fullerton City Council, and Defendant acted in pursuance of personal motives." (*See* Excerpts of Record, Book II, page 101.) [Emphasis added.] The amended complaint for the first time in the case alleged conspiracy by the complaining witnesses.

On February 20, 1996, and cognizant of the amended complaint in *Hume v. Flory*, defendant BANKHEAD and the City of Fullerton filed a Demurrer to the complaint in *Stitch v. Bankhead*. At page 4 of the Demurrer, BANKHEAD's attorney wrote that "there are no allegations in the Hume complaint which eliminate the possibility that Bankhead was acting in his role as a councilmember when he allegedly gave information to the Fullerton Police Department and 'put pressure on' the district attorney's office to continue Hume's prosecution... The conduct alleged in the Hume action is then arguably within the scope of Bankhead's employment as a Councilmember for the City. It is for this reason that the City Attorney recommended that Bankhead be defended." Thus Petitioner was soon after that time placed on notice as to an admission against interest by defendant BANKHEAD as to his having acted in the course of his duties as a public official.

On February 22, 1996, defendant BANKHEAD filed

an Answer in the Petitioner's state case *Hume v. Flory*. In that Answer, defendant BANKHEAD pleaded a "Fourth Affirmative Defense" of "Privilege." Under California law, the only statutory or decisional law "privilege" in malicious prosecution actions for criminal complainants and complaining witnesses is official immunity. Thus Petitioner was for a second time placed on notice as to an admission against interest by defendant BANKHEAD as to his having acted in the course of his duties as a public official.

On March 8, 1996, and March 11, 1996, Petitioner wrote letters to STITCH's counsel in the case *Stitch v. Bankhead*, namely Mark S. ROSEN, asking if Petitioner should direct his own attorney in the case *Hume v. Flory*, namely David M. PRICE, to further amend the pleadings in *Hume v. Flory* to reflect defendant BANKHEAD's admissions in the Stitch case. Attorney ROSEN advised Petitioner's attorney that local legislators such as city councilmen are not "employees" for purposes of the California statutory immunity, and that defendant BANKHEAD could not, therefore, enjoy any immunity on account of his official actions. (*See* full discussion of this latter point of law at pages 2-3 of Petitioner's "Response to Notice of Presentation of Additional Citation by Defendant Godfrey," in the appellate record of this case.)

On March 22, 1996, Petitioner filed his "Declaration of William Snow Hume in Support of Opposition to Motions to Strike First Amended Complaint and Demurrers etc." in the state case *Hume v. Flory*. (*See* entire Declaration attached as Addendum to "Reply to Brief of Appellees Unocal Land & Development Company, Union Oil Company of California etc." in the appellate record of the instant case.) Paragraph 19 of that Declaration stated that, on October 4, 1994, Petitioner "specifically admonished Detective WALLIS and Sergeant MAYNARD twice to not commence any [criminal]

proceedings against [him] without first independently verifying the ownership of said southeast parcel. [Petitioner] also admonished them to not commence any criminal proceedings against [him] without first contacting the 'corporate' offices of Unocal in Los Angeles and the headquarters offices in Los Angeles of 'Unocal Production.' The second time [Petitioner] admonished them, [he] told them that, if they commenced a criminal case against [him] without verifying the ownership and control of the subject parcel at Brea and Bastanchury, [he] would eventually be exonerated, and that [he] would sue them for malicious prosecution in federal court where they had no immunity." Thus the majority of the secondary defendants in the instant federal case were placed on notice soon after March 22, 1996, that Petitioner was likely to soon sue the principal defendants in federal court[2], before the one-year limitations period ran out.

Also on March 22, 1996, the same judge who was hearing *Hume v. Flory*, namely James JACKMAN, sustained a demurrer in the aforementioned state case *Stitch v. Bankhead*, apparently agreeing that defendant BANKHEAD acted in the course of his duties as a councilman.

On March 29, 1996, the court in the state case *Hume v. Flory* sustained a demurrer without leave to amend by several defendants in that case who are defendants in the instant case, namely, the complaining witnesses BANKHEAD, WILLIAM PETER GODFREY, JAN FLORY AKA JANESSE BORIS and BILL FLORY. Demurrer was granted to another defendant in the state case, James Vincent BUCK, who is not a party to the federal case. Judge JACKMAN made very

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[2] As of March, 1996, Petitioner was already suing defendant MAYNARD in federal court for other acts committed by MAYNARD before the filing of the criminal complaint. *Hume v. Maynard*, SACV 95-849 LHM.

clear that his holding as to these five defendants was based upon his concern to not impose liability upon complaining witnesses: "to allow this matter to proceed is to really fly in the face of public policy that encourages people [who] believe there has been wrongdoing to be able to go to the proper authorities and to explain their position or report what they see as wrongdoing to the police or district attorney's office." (*See* Excerpts of Record, Book II, page 118, lines 5-10.) Judge JACKMAN made no reference whatsoever to the issue of probable cause.

On April 3, 1996, Petitioner filed the instant federal case. Only two days later, on April 5, 1996, Judge JACKMAN at a status conference in the state case *Hume v. Flory* reiterated that his holding did not involve the calculus of probable cause, but rather the freedom from civil liability for complaining witnesses: "I did not find Mr. Hume guilty of anything, if that's what you're asking me. That issue was not before the court and I didn't rule on that. It had merely to do with the right to go to the proper authorities with complaints, [to] allege[] criminal activity and allow those authorities to make their decision. That would be more nearly the way I would phrase it, although I said it as best I could on the record last Friday. I don't want to really try to refine it too far." (*See* Excerpts of Record, Book II, page 120, line 22 to page 121, line 5.)

Thus, as of the time he commenced the instant federal action, Petitioner had been twice placed on notice of an admission by secondary defendant BANKHEAD that BANKHEAD had acted in the course of his official duties. Petitioner had also been placed on notice, from Judge JACKMAN's statements on March 29, 1996, that the only collateral estoppel which could eventually arise from the unsuccessful termination of the state case would pertain to the secondary defendants' activities *as mere complaining*

witnesses.

B. Trial Proceedings Below in the Instant Case

Petitioner filed the Complaint in the instant case on April 3, 1996, soon after Judge JACKMAN's twin rulings sustaining demurrers in the cases *Stitch v. Bankhead* and *Hume v. Flory*. The Complaint contains five counts in all, four of which are federal civil rights actions under 42 U.S.C. § 1983. No federal claims were ever pleaded in the state court action.

Count I of the Complaint, for Malicious Institution of Criminal Proceeding under Color of Law, sues primary defendants WALLIS and MAYNARD, who, as noted above, could not be joined in the state court action. (*Cf.* paragraph 47 of the Complaint, Excerpts of Record, Book I, pages 41-42.) Defendant BANKHEAD was also named in this count; paragraph 7 of the Complaint specifically recites that defendant BANKHEAD's actions in the state case *Stitch v. Bankhead* was Petitioner's evidence that BANKHEAD acted in the course of his official duties as a city councilman. (Excerpts of Record, Book I, page 28.)

Count II at paragraph 50 of the Complaint alleges that defendants GODFREY, JAN FLORY, DENNIS CHAPMAN, UNOCAL LAND AND DEVELOPMENT COMPANY, and UNOCAL CORPORATION conspired with defendant BANKHEAD to "abuse BANKHEAD's authority as a city councilmember to maliciously and without probable cause institute a criminal proceeding against [Petitioner] HUME." (Excerpts of Record, Book I, page 43.) Count III is similar: "Conspiracy to Maliciously Maintain Criminal Proceeding Under Color of Law."

State court defendant BILL FLORY is not named in either of the federal counts sounding in malicious prosecution, and defendant BANKHEAD is named as an official rather

than private actor. Otherwise, virtually all of the surplusage (i.e., probative fact pleading) in Counts II and III of the federal Complaint match verbatim the surplusage of the First Amended Complaint in the state case *Hume v. Flory*, because they are based upon the Petitioner's knowledge as of early April, 1996.

At no time during the trial or appellate phases of this federal case has any defending party or court adduced any legal authority to support the proposition that virtually the same probative facts could not simultaneously support more than one cause of action. Nor has anyone advanced the proposition that the same facts could not simultaneously support a federal cause of action while failing to support a state cause of action based upon a different theory of recovery. (The entire trial record is now in possession of the District Court.)

The gravamen of the second and third federal counts is not what these defendants did *as complaining witnesses*, but rather their *conspiracy to aid official malfeasance* by defendant BANKHEAD. Virtually the same pleaded facts--except for the new facts about BANKHEAD's actions as an official-- could pertain to both the state and federal cases' theories of recovery. Yet no court or opponent in the instant proceeding has explained exactly **why** an eventual adverse ruling in the California Court of Appeal as to the liability of complaining witnesses for malicious prosecution ought to work any collateral estoppel in a federal case concerning a conspiracy to abuse another's office in order to maliciously prosecute; the courts below have simply conclusorily stated that the federal causes of action sounding in malicious prosecution necessarily would depend upon the results of the state court action. (*See* ¶4 at Court of Appeals' "Memorandum" at App.D, page 3, *infra*, and District Court's "Civil Minutes- General" dated May 31, 1996 at App.F, page

4, *infra*.)

Counts IV and V both sound in abuse of process, though count IV is for "Conspiracy to Abuse Process *Under Color of Law*" whereas count V is a garden variety pendent state tort action for abuse of process. "Abuse of Process" is a tort very different from that of "malicious prosecution," and the issue of probable cause is completely irrelevant to it. No claims for abuse of process were ever pleaded in the state action *Hume v. Flory*. Collateral estoppel (i.e., "issue preclusion") as to these two federal counts is therefore impossible, as the Petitioner has repeatedly pointed out to the courts below. (*See* "Plaintiff's Memorandum of Points and Authorities in Re Defendants' Responses to Order to Show Cause Re: Stay," page 6, note 3, and page 21, lines 4-6, at Excerpts of Record, Book II, page 128 and page 143; Appellant's [=Petitioner's] Opening Brief, page 59, in the appellate record of this case.)

On April 17, 1996, not long after the filing of the Complaint in the instant federal case, the district court *sua sponte* issued a combination "Order to Show Cause Re: Dismissal of Malicious Prosecution Claims" and "Order to Show Cause Re: Dismissal of Fourth Claim for Abuse of Process," directing Petitioner to file a response to the "OSCs" by April 24, 1996, and to file a Reply to the defendants' replies by May 7, 1996. Petitioner filed his response and Replies as directed.

The district court never did rule on its original OSCs, despite its earlier expressed certitude that Petitioner's pleadings were defective. Rather, on May 10, 1996, the district court issued an "Order to Show Cause Re: Stay," directing *defendants* to file a response and directing Petitioner to file a Reply to such responses. Petitioner filed his Response on May 24, 1996. In his Response, Petitioner demonstrated that the California law of claim preclusion,

applicable on account of the rule announced at *Migra v. Warren City School District Bd. of Education*, 465 U.S. 75 (1984), would not affect the instant federal causes of action. (*See* Excerpts of Record, Book II, page 140 line 11 to page 143 line 1.)

In order to ensure through an entirely alternative means that claim preclusion could not prospectively disturb the federal case, Petitioner on May 29, 1996, filed his "Plaintiff's Notice of Reservation of All Federal Claims" in the Orange County Superior Court case *Hume v. Flory*. (*See* App. B, *infra*.)[3] On May 30, 1996, Petitioner filed his "Plaintiff's Supplemental Request for Judicial Notice Re: 'Order to Show Cause Re: Stay'" with the federal district court, which request noted that the reservation of federal claims had been filed the previous day with the Superior Court. (*See* App. C, page 2, *infra*.)

On May 31, 1996, the federal district court imposed a conditional stay in deference to the state court proceeding *Hume v. Flory*. (*See* District Court's "Civil Minutes-General" dated May 31, 1996 at App.D, *infra*.) That was the order from which appeal was taken. Ironically, the very same day, Judge JACKMAN signed the Judgment of Dismissal in the state case *Hume v. Flory*.

The district court's was aware that defendant BANKHEAD was claiming official immunity and invoking his official status to get the City of Fullerton to pay for his legal fees. (*See* page 12, lines 1-14 of "Plaintiff's Memorandum of Points and Authorities in Re Defendants' Responses etc." at Excerpts of Record, Book II, page 134.) Yet despite its knowledge, the district court's "Civil Minutes"

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[3] Out of an abundance of caution, Petitioner's counsel filed a similar notice of reservation of federal claims with the California Court of Appeal in the appeal of the state case *Hume v. Flory*.

make no reference whatsover to the other "similar" state case, *Stitch v. Bankhead*. Instead, the district court pointed to the inconsistency of the state and federal pleadings as to that precise fact of BANKHEAD's official status. The court then commented in the "Civil Minutes" that "plaintiff's federal complaint contradicts the state complaint in an effort to invoke this Court's jurisdiction." (*See* App. D. page 4, *infra*.) This finding by the district court forms the basis for Question #2 presented in this petition.

Further, the district court did not dispute Petitioner's aforementioned argument that claim preclusion would have no effect on the case. Indeed, the district court asserted that "[a]ffirmance of the state court's ruling on the demurrer will end plaintiff's federal litigation **in part**," thus admitting that the state court action will not dispose of the entire federal matter. This concession by the district court is significant for Question #4 presented in this petition.

Further, the district court did not distinguish the case cited by Petitioner, *Tucker v. First Maryland Savings & Loan, Inc.*, 942 F.2d 1401 (9th Cir. 1991), for the proposition that *Colorado River* doctrine is not applicable unless there the allegedly "parallel" cases have an identity of parties, claims and issues. Instead, the district court invoked, as a supposedly contrary authority, a case that had not been cited by the responding defendants, namely, *Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989). (*See* Excerpts of Record, Book II, page 126.) Thus Petitioner was not given an opportunity to distinguish *Nakash*, as he later did in his "Opening Brief" on appeal. This issue is presented as Question #3 in this appeal.

Finally, nowhere in the "Civil Minutes" did the district court address the "fifth factor" under *Colorado River/Moses H. Cone* stay doctrine, namely, "the presence of federal-law issues." *Moses H. Cone*, 460 U.S. at 25-26. (*See* "Civil

Minutes" at App. D, *infra*.) Petitioner had elaborately briefed this very issue for the district court. (*See* "Plaintiff's Memorandum of Points and Authorities etc.," pages 9-14, at Excerpts of Record, Book II, pages 131-136.) Although Petitioner on appeal reiterated this point (*see* part IV.C. at page 53 in his "Opening Brief" in the appellate record), the court of appeal did not address this factor, either. This complete failure by both courts to address the "presence of federal-law" factor forms the basis for Question #1 presented in this petition.

C. Appellate Proceedings Below in the Instant Case

Petitioner filed his "Notice of Appeal" in the instant case on June 11, 1996. On August 5, 1996, Petitioner filed his "Opening Brief" in the appeal, and the defendants' responding briefs and Petitioner's reply briefs followed. The case was heard without oral argument and the Memorandum filed on March 17, 1997.

In his Opening Brief, Petitioner raised sixteen separate subsidiary issues of law that bore upon the larger question on appeal[4]. In the Memorandum, the appellate panel did not address a single one of these points. (*Compare* Memorandum at App. F, pages 2-5, *infra*, with "Table of Contents" from "Opening Brief" at App.E, pages 1-3, *infra*.) A comparison of the Memorandum with the district court's "Civil Minutes" of the stay order (at App. D, *infra*) shows that no issue of law was raised in the Memorandum that was not raised in the "Civil Minutes."

Question #1 presented in this petition corresponds to

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[4] These were argued at the respective parts of the text outlined at II.A.; II.B.; III.A.; III.B.1.a.; III.B.1.b.; III.B.2.; III.B.3.; III.C.; III.D.; III.E.1.; III.E.2.; IV.A.; IV.B.; IV.C.; IV.D.; and IV.E. (*See* these at the "Table of Contents" from the "Opening Brief" at App., *infra*, .)

point IV.C. in the Opening Brief, a point that was not discussed by either the district court or the appellate panel. Question #2 presented in this petition corresponds to points II.A. and II.B. in the Opening Brief, neither of which were discussed by the appellate panel[5]. Question #3 presented in this petition corresponds to points III.A., III.B, III.D., III.E.1. and III.E.2. in the Opening Brief, none of which were discussed by the appellate panel, save for a dismissive reference to *Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989). Nor did the appellate panel explain why Petitioner's numerous distinctions of *Nakash* did not satisfy them in this case[6]. Question #4 presented in this petition corresponds to point III.C. in the Opening Brief, a point that was not discussed by either the district court or the appellate panel. (*See*, again, App. E, *infra*.)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Conflicts With Four Other Circuits' Holdings About the Effect of a District Court's Failure to Weigh Each Factor of the "Exceptional Circumstances" Test.

Petitioner noted at page 53 of his Opening Brief in the

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[5] Because this point involves the procedural and jurisdictional effect of an unexpected finding of fact at the pleadings stage by a district court, such a point could not have been brought at the trial level. Federal jurisdictional issues are properly raised at any time during litigation.

[6] *Nakash* was raised at the trial level for the first time by the district court itself, in its stay order. Neither the defendants nor the Petitioner had briefed the case. Petitioner discussed and distinguished *Nakash* at pages 15, 19-20, 23, 33-36, 38-39, 42-45 and 50 in his "Opening Brief."

appeal that "[t]he [district] court's **complete failure** to address or weigh this factor constitutes a serious abuse of discretion justifying this Court to vacate the order of stay." The Ninth Circuit apparently rejected this legal premise[7].

In a case where the district court "gave no obvious consideration to its 'unflagging obligation' to exercise the jurisdiction it has been granted," the District of Columbia circuit remanded a case where a stay had been imposed. *Reiman v. Smith*, 12 F.3d 222, 224 (D.C.Cir. 1993).

In two different cases, the First Circuit reversed or vacated a *Colorado River* stay where the district court had failed to document if or how it weighed the obligation to exercise jurisdiction. *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 13 (1st Cir. 1990) and *Burns v. Watler*, 931 F.2d 140, 146 (1st Cir. 1991). In *Gonzalez v. Cruz*, 926 F.2d 1, 3 (1st Cir. 1991), the First Circuit found that the record was inadequate to support the necessary evaluation for a *Colorado River* stay. Judge Breyer, now Justice Breyer, sat on each of the panels in those three cases.

The Second Circuit held in *Voktas, Inc. v. Central Soya Co., Inc.*, 689 F.2d 103 (2d Cir. 1982) that a federal magistrate had not abused his discretion, precisely because he had not failed to consider special factors, and because the court was "unwilling to find that the federal magistrate improperly limited the scope of his deliberation." 689 F.2d at 107. Clearly the holding in this case entails the premise that the failure to consider important factors would be an abuse of discretion. At any rate, the Second Circuit had earlier held that "[u]nder the traditional 'balancing test' the district judge **must** make a 'carefully considered judgment

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[7] To speak precisely, the Ninth Circuit, like the court below it, simply did not address the issue, and its rejection of the premise must be inferred from its silence.

taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise.'" *Calvert Fire Ins. Co. v. American Mut. Reinsur. Co.*, 600 F.2d 1228, 1234 (2d Cir. 1979)(long after remand from Supreme Court). [Emphasis added.]

The Fifth Circuit has recently held that a conclusory statement "is not sufficient to satisfy the 'exceptional circumstances' analysis required by *Colorado River* and *Moses Cone*." *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 589-590 (5th Cir. 1994).

All of these cases suggest that a district court must document its findings about the respective factors in a *Colorado River* analysis. This suggestion arises from the comment at *Moses H. Cone, supra*, that "the decision... [rests] on a careful balancing of the **important** factors as they apply in a given case." 460 U.S. at 17. [Emphasis added.] If the courts below believed that actions under 42 U.S.C. § 1983 do not entail "the presence of federal-law issues [which] must always be a major consideration weighing against surrender," *id.*, 460 U.S. at 26, then these courts should at least have documented the basis for such a conclusion.

In connection with the "fifth factor," namely the effect of the presence of a federal issue in the federal case, it should be noted that the Eleventh Circuit has held "that *Colorado River Water District* has been rejected as a basis for abstention [from claims] under Section 1983." *Alacare, Inc.-North v. Baggiano*, 785 F.2d 963 (11th Cir. 1986)(citing *Forehand v. First Alabama Bank of Dothan*, 727 F.2d 1033, 1036 (11th Cir. 1984)). [Petitioner noted this latter case at page 7 in his "Reply to Brief of Appellees Unocal Land & Development Company, Union Oil Company etc.," in appellate record of this case.] Further, the Third Circuit has held in a § 1983 case that a stay order could not have been made under the *Colorado River* doctrine where the plaintiffs

had not placed their § 1983 claims before the state proceeding. *Marcus v. Township of Abington*, 38 F.2d 1367 (3d Cir. 1994).

In connection with this observation, it should be noted that the Supreme Court has held that a stay of a federal question cause of action in favor of a parallel proceeding would not have been any longer appropriate after the federal question was no longer being considered by the parallel state forum. *Lucas v. Forty-Fourth Gen. Assem. of Colo.*, 377 U.S. 713, 716 n.3 (1964).

Though a complete split among the circuits has not yet emerged as to whether **damage** claims under 42 U.S.C. § 1983 are exempt from *Colorado River* deferral, yet the Third and Eleventh Circuit positions at least highlight the failures by the district court and the Ninth Circuit below to even consider what degree the federal courts have an "unflagging obligation" to hear § 1983 claims.

It is now timely for the Supreme Court to clarify whether it is error or abuse of discretion to fail to address the weight to be assigned to the presence of a damages claim under 42 U.S.C. § 1983.

II. The Ninth Circuit's Holding Conflicts With At Least Three Other Circuits' Holdings that Abstention is Not Permissible Where Jurisdiction is Uncertain

The First Circuit has held that abstention analysis (of any sort) is not proper where a jurisdictional question is unresolved. *Colonial Penn Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 238 n.8 (1st Cir. 1987); *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 13 n.9 (1st Cir. 1990); and *Gonzalez v. Cruz*, 926 F.2d 1, 5 and 7 (1st Cir. 1991)(holding that court should conduct discovery, if

necessary, to determine its diversity jurisdiction prior to abstaining).

Similarly, the Seventh Circuit has held that until a district court first finds that "the constitutional questions are substantial" to support federal question jurisdiction, no jurisdiction accrues to abstain. *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130 (7th Cir. 1981).

The Third Circuit has found that *Colorado River* abstention analysis was premature, where the district court had not first satisfied itself of having jurisdiction. *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 47 (3d Cir. 1990). *Cf. Scattergood v. Perelman*, 945 F.2d 618, 627 (3d Cir. 1991).

As noted above, the district court specifically found that "plaintiff's federal complaint contradicts the state complaint [as to BANKHEAD's official role] in an effort to invoke this Court's jurisdiction." (*See* App. D. page 4, *infra.*) If the court believed that Petitioner did so, the court was obliged to dismiss those portions of the case which wrongly "invoked" the federal court's jurisdiction. *Cf. Bell v. Hood*, 327 U.S. 678, 682 (1946)("a suit may... be dismissed for want of jurisdiction... where such a claim is wholly insubstantial and frivolous." Had it done so, almost no "virtually identical" passages shared by the respective state and federal complaints would have remained at all. (*See* ¶ 3 at "Civil Minutes," App. D, page 3, *infra.*)

In the alternative, as suggested by *Gonzalez v. Cruz, supra*, the court could have directed limited discovery to determine defendant BANKHEAD's real role as a private or state actor.

As noted above, the district court never did rule on its "OSCs" concerning the Complaint's purported failures to state deprivations of federal rights. Such a purported failure goes to the very essence of the court's federal question jurisdiction.

Where the court doubts its own jurisdiction, it ought, under the consensus rule noted above, to first resolve its doubts before it proceeds to abstain from or stay the action. (*See* point II.A. at pages 11-12 of "Opening Brief" in appellate record of this case.)

It should be noted that the Supreme Court recently stated that "absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed." *Edwards v. Balisok*, -- U.S. --, 97 Daily Journal D.A.R. 6289, 6291 (May 19, 1997)(holding stay in favor of parallel *administrative* proceeding to be error).

In summary, it is now seasonable for this Court to declare if district courts ought to always resolve jurisdictional questions before undertaking an abstention or stay analysis.

III. The Circuits are Quite Split as to Whether and How a District Court Must Find that "Parallel" or "Concurrent" State and Federal Cases Exist Before Imposing *Colorado River* Abstention or Stay.

With the exception of the Ninth Circuit, all of the major circuits have explicitly held that the existence of "parallel" or "concurrent" state and federal cases is a threshold or preliminary condition that must be met before *Colorado River* abstention or stay may be imposed. *Villa Marina Yacht Sales, supra,* 947 F.2d at 529 (1st Cir.1991)(using language of "sufficiently parallel"); *Alliance of American Insurers v. Cuomo*, 854 F.2d 591, 603 (2nd Cir. 1988) and *Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 49-50 (2nd Cir. 1994); *General Glass Indus. Corp. v. Monsour Medical Found.*, 973 F.2d 197, 199 (3d Cir. 1992); *New Beckley Mining Corp. v. International Union, UMWA*, 946 F.2d 1072,

1073 (4th Cir. 1991), *cert. denied*, -- U.S.--, 112 S.Ct. 1587, 118 L.Ed.2d 306 (1992); *Hartford Accident & Indem. v. Costa Lines Cargo Serv.* 903 F.2d 352, 360 (5th Cir. 1990); *Baskin v. Bath Tp. Bd. of Zoning Appeals*, 15 F.3d 569 (6th Cir. 1994); *Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 700 (7th Cir. 1992); *In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 477 (8th Cir. 1995); *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994); *I. A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1551 (11th Cir. 1986); *Consumers Union of U.S. v. Consumer Product Safety Commission et al.*, 590 F.2d 1209, 1219 (D.C.Cir. 1978).

Despite Petitioner's invitation, the Ninth Circuit declined to declare that its law would require such a preliminary finding. (*See* page 20 of Petitioner's "Opening Brief" in appellate record of this case.) Several Ninth Circuit cases suggest that mere "similarity" will trigger the *Colorado River*, and that the degree or absence of similarity between the state and federal cases bears upon the applicability of the six or seven traditional *Colorado River* factors. *Cf. Kittitas Reclamation Dist. v. Sunnyside Valley Irr.*, 763 F.2d 1032, 1035 (9th Cir. 1985)(as an issue whose absence precludes all factors); *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989)(similarity as a factor) and *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1372 (9th Cir. 1990).

It is now seasonable for the Supreme Court to declare whether or not the existence of "parallel" or "concurrent" proceedings, rather than the existence of merely *similar* proceedings, is a threshold or preliminary condition for *Colorado River* analysis.

Further, the circuits are quite split as to <u>how</u> "parallelism" or "concurrence" is to be determined. As Petitioner noted at Point B.1 at pages 20-22 of his "Opening Brief," the circuits are split as to whether to the comparison

of the federal case may be made to *theoretical* state proceedings. Clearly against theoretical comparisons: Fifth Circuit, *Mendiola v. Hart*, 561 F.2d 1207, 1208 (5th Cir. 1977); Sixth Circuit, *Baskin v. Bath Tp. Bd. of Zoning Appeals*, 15 F.3d 569 (6th Cir. 1994); Tenth Circuit, *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994); Eleventh Circuit, *American Mfrs. Mut. Ins. v. Edward D. Stone, Jr.*, 743 F.2d 1519, 1525 (11th Cir. 1984). Clearly in favor of comparison to state proceedings as they might have been conducted: Second Circuit, *Telesco v. Telesco Fuel & Masons' Materials, Inc.*, 765 F.2d 356, 359 (2d Cir. 1985); Seventh Circuit, *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1308 (7th Cir. 1988); and Eighth Circuit, *Wolfson v. Mutual Ben. Life Ins. Co.*, 51 F.3d 141, 146 (8th Cir. 1995)(plaintiff could assert her same federal statutory claim in state court insolvency proceeding that had available concurrent jurisdiction under 29 U.S.C. § 1132(e)(1)). [But *compare* also, in a different abstention context, *Moe v. Brookings County, South Dakota*, 659 F.2d 880, 883 (8th Cir. 1981), stating that abstention is not appropriate "merely because a State court could entertain the suit."] Apparently in favor of comparison to theoretical state proceedings: D.C. Circuit, *Martin-Trigona v. Smith*, 712 F.2d 1421, 1425, 1426 (D.C.Cir. 1983) (asking whether concurrent forum has power to hear all claims pleaded in the federal complaint).

Apparently the Ninth Circuit chose in this case to compare to theoretical proceedings. It found that Petitioner "has not demonstrated that the state court cannot adequately protect his rights" (*see* App. F, page 4, *infra*), despite that Petitioner never placed any federal claims before the state court. Thus the Ninth Circuit panel tacitly endorsed the district court's observation that Petitioner was adequately protected by the state court because he *could* have pleaded his § 1983 claims there, since state courts have concurrent

jurisdiction over § 1983 claims. (*See* ¶ 5 of "Civil Minutes" at App. D, page 4, *infra*, and compare to *Wolfson, supra.*)

Because of the clear split in the circuits, it is appropriate for the Supreme Court to clarify whether a district court may, in its determination of "parallelism" or "concurrence," consider how a federal litigant ought to have pleaded in a similar state court action, rather than how he or she actually pleaded in a similar state action.

Further, there is a split among the circuits as to identity of parties and issues. Firstly it must be noted that cases following *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942), which was cited in the original *Colorado River* case in reference to the third "piecemeal litigation" factor, generally require an **identity of parties and issues**. *Cf.* especially *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126-128 (1968). Further, the *Colorado River* court cited, as authority for its "fourth factor," *Pacific Live Stock Co. v. [Lewis and] Oregon Water Bd.*, 241 U.S. 440 (1916), which unmistakably referred to the old "plea in abatement for another action pending," and held an "identity in the ...rights asserted" standard applicable. 241 U.S. at 447. Most of the common law rules pertinent to this plea in abatement focus upon prospective preclusive effect.

Thus some circuits appear to have inferred from these citations a requirement that the state and federal cases share an identity of parties and claims or issues before a *Colorado River* analysis is performed. First Circuit: *Consumers Union of U.S., supra,* at 1219 (D.C.Cir. 1978)("the plaintiff in the later federal suit was a party to the earlier action involving the same issue and subject matter."); Third Circuit: *Trent v. Dial Medical of Florida, Inc.*, 33 F.3d 217 (3d Cir. 1994)(parties and claims); Fourth Circuit: *Transdulles Center Inc. v. USX Corp.*, 976 F.2d 219, 224 (4th Cir. 1992)(parties

and legal theories, rather than similar facts, controls); Fifth Circuit: *Hartford Accident & Indemnity Company v. Costa Lines Cargo Serv.*, 903 F.2d 352 (5th Cir. 1990); Sixth Circuit: *Baskin v. Bath Township Board of Zoning Appeals*, 15 F.3d 569, 572 (6th Cir. 1994)(parties and issues); Eighth Circuit: *Wolfson, supra*, 51 F.3d at 145 (8th Cir. 1995) (criterion is whether "there is such a... state court procedure purporting to bind the federal court plaintiff"); Tenth Circuit: *Fox v. Maulding, supra*, 16 F.3d at 1081 (10th Cir. 1994) ("substantially the same parties litigate substantially the same issues"); Eleventh Circuit: *I. A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1551 (11th Cir. 1986) ("if the parties, issues and available relief do not significantly differ").

In contrast, three circuits have adopted the "substantial similarity" standard which focuses upon the similarity of the facts giving rise to the state and federal cases, and which does not much look at the prospective preclusive effect of the state action. These three circuits include the Second Circuit: *Telesco, supra* (2d. Cir. 1985); the Seventh Circuit, *Interstate Material Corp. v. City of Chicago,* 847 F.2d 1285, 1288 (7th Cir. 1988); and Ninth Circuit, *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989) ("exact parallelism... is not required"). Indeed, both the district court and the appellate panel relied on *Nakash, supra,* to find the *Colorado River* doctrine applicable to this case. (*See* ¶ 3 of "Civil Minutes," App. D, page 3, *infra*, and reference to "spin-off" in Memorandum at App. F, page 4, *infra*.)

Petitioner during the appeal in this case attempted to show that the district court incorrectly interpreted *Nakash* to mean that mere **factual similarity** could establish "concurrence." Petitioner argued that the holding in *Nakash* about nonparallel parties could be reconciled by recourse to common law "alter ego" rules for the "plea in abatement for another action pending." (*See* point III.D. at pages 33-37 in

the "Opening Brief" in the appellate record in this case.) But in its ruling, the appellate panel simply did not address Petitioner's issue about the lack of identity of the state and federal cases as to parties. (*See* App. F, *infra.*)

After Petitioner's appeal was filed in 1996, the Ninth Circuit held that a federal plaintiff could be forced, under the *Colorado River* doctrine, to await the outcome of a state proceeding to which it was not a party, but which involved similar issues of law. *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 297 (9th Cir. 1996). This doctrinal development may partly account for why the appellate panel in this case ignored Petitioner's issue as to the existence of additional defendants in the federal case.

Following the principle announced in *Fireman's Fund Ins. Co., supra,* the district court might now be well able to stay the instant federal case in favor of the state case *Stitch v. Bankhead*, which was discussed above in the Statement of the Case, since it concerned an "overlapping assertion." (*Cf.* language at *Fireman's*, 87 F.3d at 297.)

The holding in *Fireman's* represents an extreme of the "substantial similarity" doctrine which (to Petitioner's knowledge) no other circuit has attained. *Fireman's* is thus almost indistinguishable from the pattern in *Landis v. North American Co.*, 299 U.S. 163 (1936), a case also cited in *Colorado River, supra*, in connection with abstention among concurrent federal fora. 424 U.S. at 817. Ironically, *Colorado River* cited *Landis* for the proposition that "the general principle... to avoid duplicative litigation" in "wholly federal concurrent jurisdiction" was not applicable to "state-federal concurrent jurisdiction." *Id.*

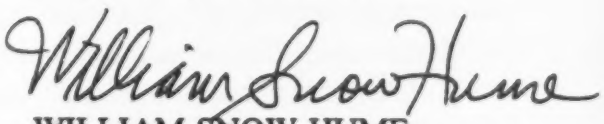
Because the Ninth Circuit panel in the instant case did not even address whether there should be a threshold requirement for "parallelism" or "concurrence" between the state, one cannot know for sure whether the panel in this case

looked at "substantial similarity" as a factor, or whether it instead determined that the apparent "substantial similarity" of the two cases did indeed constitute "parallelism." Certainly there is no evidence of any careful comparison of parties, claims or issues. (*See* App. F, page 4.) Petitioner suggests that the rationale as to Question #1 presented above ought to apply as well to courts' failures to document their findings as to the "parallelism" or "concurrence" of state and federal cases.

CONCLUSION

"*Colorado River*, intended by the Court to be a shallow stream, threatens to overflow its banks due to the efforts of district court judges to control burgeoning dockets." *Medema v. Medema Builders, Inc.*, 854 F.2d 210 (7th Cir. 1988). As documented above, it has now become a torrent of inconsistent holdings. The petition for certiorari should be granted.

Respectfully submitted,



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APPENDICES

APPENDIX A

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FILED
ORANGE COUNTY SUPERIOR COURT
JAN 04 1996
ALAN SLATER, Executive Officer/ Clerk

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

STUART STITCH, Plaintiff, V. CITY OF FULLERTON, a Municipal Corporation; Corporation; JAMES D. BANKHEAD; DOES 1 - 50, inclusive, Defendants.	CASE NO. 757801 COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES

Plaintiff Stuart Stitch complains and alleges as follows:

I.

FIRST CAUSE OF ACTION

(Declaratory Relief)

1. Plaintiff Stuart Stitch is a resident, voter, and taxpayer of the City of Fullerton.

2. Defendant City of Fullerton is now and was at all times herein a municipality in the County of Orange.

3. Defendant James D. Bankhead is an essential party to this action because he is the person whom the expenditure alleged herein would benefit.

4. The persons named herein as Does 1 -50 are unknown to plaintiff at this time. Plaintiff will amend this complaint to allege their true names and capacities when the same have been ascertained. Plaintiff is informed and believes and thereon alleges that said persons are necessary for this action or otherwise have an interest in the result of this action or are liable for any monies disbursed prior to or during the pendency of this action.

5. During the calendar year 1994 defendant Bankhead was a member of the Fullerton City Council. As a result of petitions circulated in the city of Fullerton under the auspices of an organization named Fullerton Recalls Committee, the question of whether three councilmembers, including Bankhead, should be recalled was placed on the June 7, 1994, ballot in the City of Fullerton. At the election held on June 7, 1994, the voters of the City of Fullerton voted to recall all three councilmembers, including Bankhead. Bankhead's term would otherwise have run until November of 1996, while the two other councilmembers' terms expired in November of 1994.

6. The election results were certified by the Registrar on June 14, 1994. The city clerk and the council refused to call a special election for the two terms that were to expire in November, 1994, and set the election for the Bankhead seat for the regular election date in November, 1994. Fullerton Recalls Committee then filed an action in the Superior Court of the State of California for the County of Orange to compel the city clerk to call the election. On July 22, 1994, the Superior Court issued

a writ of mandate instructing the clerk to call an election for October 18, 1994, to fill all three seats subjected to the recall. The election was held on October 18, 1994, and Bankhead left office.

7. Despite the recall, Bankhead ran for one of the seats of the other recalled councilmembers that were to be replaced on November 8, 1994, and was therefore a candidate in the November election. Individuals named Peter Godfrey and Jan Flory were also candidates, with Godfrey running for the Bankhead term that would run through November of 1996, and Flory running for one of the recalled terms in the October 18 election and one of the new terms commencing in November of 1994.

8. On October 18, Godfrey was elected to fill the Bankhead term and Flory was elected to complete one of the other terms. On November 8, 1994, Bankhead and Flory were elected to new four year terms.

9. On or about November 2, 1995, one William Snow Hume, a resident of the city of Fullerton and a member of Fullerton Recalls Committee in 1994, filed a complaint in the Orange County Superior Court, Case No. 755114, against Bankhead, Flory, Godfrey, one Bill Flory, Unocal Land and Development Company, and Dennis Chapman (hereinafter referred to collectively as "the Hume defendants"). The complaint contains two causes of action for malicious prosecution. A copy of the complaint is attached hereto as Exhibit A.

10. The Hume complaint alleges in Paragraph 4 of the complaint that on October 5, 1994, while Bankhead, Flory, and Godfrey were candidates, the Hume defendants caused a criminal complaint to be filed in the Orange County District Attorney's office against Hume. Paragraph 7 of the complaint refers to Bankhead and states that Bankhead was maliciously motivated to cause the criminal complaint because Hume was Bankhead's and the other Hume defendants, political rival "and had previously caused Defendant Bankhead and other members of the Fullerton City Council to be recalled and removed from their offices as

members of the City Council of the City of Fullerton, California,,.

11. The second cause of action for malicious prosecution in the Hume complaint, at paragraph 10, alleged that after the criminal proceeding had been filed, the Hume defendants "had a material input and influence on the conduct of the said litigation in that, the said Defendants, and each of them, commenced or continued to give false information to the Fullerton Police Department". The complaint contains no other allegations regarding the facts of the incidents.

12. Nothing in the complaint alleges that Bankhead performed any action in his capacity as a Fullerton city councilman or otherwise did any act in his official capacity or in any other capacity for which he would be entitled to reimbursement from the City of Fullerton for his legal expenses. The complaint alleges that Bankhead acted in his individual capacity or as a candidate for office by filing false charges and giving false information to the police department, just as did Godfrey, Flory, Bill Flory, Unocal, and Chapman, who were not councilmembers at the time.

13. After Bankhead, Godfrey, and Flory were served with the Hume complaint, Bankhead and Godfrey submitted the complaint to the City of Fullerton and requested that the City of Fullerton provide a defense. At the Fullerton city council meeting of December 5, 1995, the City Council went into a closed session to consider these requests. Thereafter, the city attorney announced that the council had decided to deny Godfrey's request but to reimburse Bankhead for his attorneys fees and costs and to provide him with a defense to the Hume action, because Bankhead had been on the city council at the time of the events alleged in the Hume action. The council then voted, with councilmembers Flory, Godfrey, and Mayor Julie Sa voting in favor of the motion. A copy of the council announcement and action, as shown in the minutes, is attached hereto as Exhibit B.

14. An actual controversy has arisen and now exists between plaintiff, as a taxpayer and resident of the City of

Fullerton, and defendants concerning the right and legality of the City of Fullerton to pay for any of Bankhead's expenses and legal fees, and the procedure by which the decision to do so was made. Plaintiff contends as follows:

(A) The city council was without authority to provide a defense for Bankhead because the actions taken by Bankhead were not taken in his role as a councilmember but as a private citizen and candidate for office.

(B) The city council was without authority to provide a defense for Bankhead because such a defense constitutes compensation for an officer which is not authorized by law.

(C) The provision of a defense and payment of Bankhead's legal fees and expenses constitute a gift of public money which is prohibited by the state constitution.

(D) The subject matter did not involve litigation concerning the City of Fullerton, and therefore it was improper to discuss the matter in a closed session without public debate on the matter.

(E) Councilmembers Godfrey and Flory had a conflict of interest in voting on the payment of legal fees for Bankhead in matter in which they were also defendants, in that they had a direct financial interest in having the legal fees of a codefendant paid such that the legal work performed on behalf of that co-defendant would lessen the burden on them, and furthermore, with regard to Godfrey, the action would set a precedent for the payment of his' own legal fees.

15. Plaintiff is informed and believes and, based upon such information and belief, alleges that defendants contend that the expenditure of money for the defense of Bankhead is legal and proper.

16. Plaintiff desires a judicial determination whether the actions taken by defendants are legal and permissible and whether the city can expend money for the legal fees and expenses of Bankhead.

17. Such a declaration is necessary and appropriate at this time in that irreparable harm, damage, and injury will be done to plaintiff and the residents and taxpayers of the City of Fullerton

by the exercise of such authority and the making of the expenditures by the City of Fullerton, and there is no adequate remedy at law or otherwise for the harm or damage threatened to be done by the actions, and such relief is necessary and appropriate to prevent a public body from acting improperly or making an illegal and unauthorized expenditure of public funds.

II.

SECOND CAUSE OF ACTION

(Injunctive Relief)

18. Plaintiff refers to paragraphs 1 through 15 of the First Cause of Action and incorporates them by this reference as though set forth in full herein.

19. A temporary restraining order, preliminary injunction, and thereafter a permanent injunction is necessary and appropriate to stop the unauthorized and illegal expenditure of such public monies.

20. Plaintiff has no plain, speedy or adequate alternative remedy to the issuance of an injunction. Unless an injunction is immediately granted the improper expenditure of public moneys will have occurred, for which the individual councilmembers voting to authorize the money may become personally liable. Even if reimbursement is ordered, Bankhead will then have received the advantage of a loan of public funds. The only remedy is to stop the initial expenditure of the public moneys.

III.

THIRD CAUSE OF ACTION

(Reimbursement and Damages)

21. Plaintiff refers to paragraphs 1 through 15 of the First Cause of Action and incorporates them by this reference as though set forth in full herein.

22. In the event that any public funds are expended on the defense of Bankhead prior to determination by this court and the issuance of an injunction, the City of Fullerton is entitled to

reimbursement from all persons responsible for the disbursement of funds, including Bankhead and Does I through 50, and an order for reimbursement is appropriate.

WHEREFORE plaintiff prays for judgment as follows:

1. For a declaration and determination that the City of Fullerton acted improperly and illegally in the procedure for deciding to adopt a resolution authorizing the payment of attorneys fees and costs for Bankhead, and that the resolution and the payment of attorneys fees and costs for Bankhead is an improper and illegal act of the City of Fullerton;

2. For a temporary restraining order, preliminary injunction, and then a permanent injunction, enjoining defendants from spending or receiving any money for the legal defense of Bankhead;

2. That the court determine that such an expenditure would be an illegal and improper gift of public money and would be an abuse of discretion;

3. That any such monies which have been paid be ordered reimbursed to the City of Fullerton by the individuals responsible for its disbursement, including Bankhead and Does I 50 or such other defendants as may be added;

4. That attorneys fees and costs be awarded to plaintiff;

5. That the court order such other and further relief as the court may deem just and proper.

DATED: December 29, 1995

/s/

MARK S. ROSEN
Attorney for Plaintiff
Stuart Stitch

APPENDIX B

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In Pro Se
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FILED
ORANGE COUNTY SUPERIOR COURT
MAY 29 1996
ALAN SLATER, Executive Officer/ Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

WILLIAM SNOW HUME, Plaintiff, vs. JAN FLORY AKA JANESSE BORIS, JAMES DON BANKHEAD, WILLIAM PETER GODFREY, BILL FLORY, UNOCAL LAND AND DEVELOPMENT COMPANY, DENNIS CHAPMAN, PROFESSOR JAMES VINCENT BUCK, and DOES 2 through 50, Inclusive, Defendants.	CASE NO.: 75 51 14 PLAINTIFF'S NOTICE OF RESERVATION OF ALL FEDERAL CLAIMS **ASSIGNED FOR ALL PURPOSES TO JUDGE JAMES JAMES A. JACKMAN** **DEPT. 31**

TO THE COURT AND THE DEFENDANTS IN THE ABOVE NAMED CASE:

Please take notice that plaintiff WILLIAM SNOW HUME hereby reserves and preserves for adjudication in the federal District Court all of his federal claims that may be based on any or all of the facts which are concerned in the above named case.

This notice is made pursuant to the rule stated in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). This notice is timely according to the explanation of this rule in *Lurie v. State of California*, 633 F.2d 786, 787-788 (9th Cir. 1980). This notice may be made in this state court, even though no collateral federal action preceded the above named action, pursuant to the holdings in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

By giving notice of his reservation and preservation of his rights to litigate his federal claims in the federal courts, the plaintiff does not concede that he has ever placed his federal claims before this state court.

In giving notice of his reservation and preservation of his rights to litigate his federal claims in the federal courts, the plaintiff intends to reserve all rights, pursuant to the requirement of *White Mountain Apache Tribe v. Williams*, 798 F.2d 1205, 1216 (9th Cir. 1984).

Pursuant to the policy enunciated in *Government & Civic Employees Organizing Committee v. Windsor,* 353 U.S. 364, plaintiff hereby requests this Court to construe his state claims "in light of" plaintiff's federal claims, whose counts are currently based on the Federal Civil Rights Act of 1871, and which may include prospective additional counts to be based on the same Act as well as on the Racketeer Influenced and Corrupt Organizations Act.

RESPECTFULLY SUBMITTED, /s/

DATED: May 28, 1996 WILLIAM SNOW HUME, *In Pro Se*

APPENDIX C

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In pro se

FILED
MAY 30, 1996
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

WILLIAM SNOW HUME, Plaintiff	**CASE # SACV 96-322 LHM (EEx)**
vs.	**PLAINTIFF'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE**
JAMES DON BANKHEAD, MICHAEL C. MAYNARD, W. J. WALLIS, WILLIAM PETER GODFREY, JAN FLORY AKA JANESSE BORIS, DENNIS CHAPMAN, UNOCAL LAND AND DEVELOPMENT COMPANY, BILL FLORY, DARRYL WOODS, UNOCAL CORPORATION, DOES ONE THROUGH 50, Defendants.	**RE: *ORDER TO SHOW CAUSE RE: STAY*** **[Fed. Rule Evid. 201]** **NO HEARING SET** **Court of Judge Linda MCLAUGHLIN**

Plaintiff William Snow Hume, in support of his "Plaintiff's Memorandum of Points and Authorities in Re Defendants' Responses to Order to Show Cause Re: Stay", requests,

pursuant to Fed. Rule of Evid. 201(d), that this Court take judicial notice of the following document:

1. "Plaintiff's Notice of Reservation of All Federal Claims" filed May 29, 1996, in Orange County Superior Court case No. 755114, attached hereto as Exhibit "A".

The authenticity of this document is capable of accurate and ready determination by the Court by resort to the clerks of local courts. Judicial notice of this document under Rule 201 is therefore appropriate, to the extent this document concerns the plaintiff's act of filing a preservation of his rights to litigate federal claims in the federal courts.

The court is advised that plaintiff's act of timely filing such notice of reservation of rights bars the defendants in this case from later asserting claim preclusion of plaintiff's federal claims, irrespective of the California law of claim preclusion. This rule was announced in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), and reiterated in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 85 n.7, 104 S.Ct. 892, 898 n.7, 79 L.Ed.2d 56 (1984), and *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 329 n.8 (9th Cir. 1995).

DATED: May 29, 1996

/s/
WILLIAM SNOW HUME, *In Pro Se*

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES-GENERAL

Case No. SA CV 96 - 322 - LHM (EEx)

Date 5/31/96

Title Hume v. Bankhead, et al.

DOCKET ENTRY

ENTERED
May 31, 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRESENT:

HON. Linda H. McLaughlin, **JUDGE**

Debra Beard
Deputy Clerk

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: STAY

IN CHAMBERS:
The Court has read and considered the parties' responses to the OSC Re: Stay issued on 5/10/96, the parties' responses to the 4/17/96 OSC, and the complaint. Pursuant to F.R.Civ.P. 78 and Local Rule 7.11, based on the papers submitted by the parties and applicable law, the Court now rules as follows:

(1) **CONDITIONAL STAY:** For the reasons discussed below, the Court stays all proceedings in the instant civil action on the following conditions:

(a) Either side may petition this Court to lift the stay after the decision in Hume v. Flory, Orange County Superior Court Case No. 755114, becomes final;

(b) Either side may petition this Court to lift the stay if any significant development occurs that affects the action before this Court; and

(c) Any petition to lift this stay must include the history and current status of all related legal proceedings.

(2) **Background.** On 10/5/95, plaintiff filed a state court action, Hume v. Flory, Orange County Superior Court Case No. 755114, alleging malicious prosecution and conspiracy against J. Flory, Bankhead, Godfrey, B. Flory, and Unocal Land and Development Co. On 2/6/96, plaintiff filed a First Amended Complaint in state court, which, among other things, added defendants Chapman and Buck. The state court sustained a demurrer to the First Amended Complaint on 3/29/96. Plaintiff appealed the Court's ruling on the demurrer.

On 4/3/96, plaintiff filed the present action, alleging malicious prosecution, based in part on 42 U.S.C. § 1983, conspiracy, and abuse of process against Bankhead, Maynard, Wallis, Godfrey, J. Flory, Chapman, Unocal

Land and Development Co., B. Flory, Woods, and Unocal Corp.

(3) **Substantial Similarity.** The parties and claims involved in the state and federal actions are "substantially similar." See Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989). For example, paragraphs 4; 5; 6; 7; 8; 9; 10; 11; 12; 13; 14; 15-17; 18; 21; 22; 23; and 31 of the First Amended Complaint filed in state court are virtually identical to the present complaint's paragraphs 17; 18; 19; 20; 25; 26; 27; 29; 30; 31; 32; 33; 34; 36; 37; 38; 50 and 56; respectively. See Godfrey Request for Judicial Notice, Ex. 1; Godfrey Response, Ex. B.

(4) **Resolution of Federal Action.** Affirmance of the state court's ruling on the demurrer will end plaintiff's federal litigation in part because of the state court judgment's collateral effect. Moreover, the court has full confidence that if the ruling on the demurrer is reversed, the litigation will continue to advance in the state court.

(5) **Exceptional Circumstances.** Exceptional circumstances warrant the imposition of a stay in the present case. First, the state court already has sustained a demurrer on plaintiff's state court complaint. If this Court were to proceed on plaintiff's federal action, the Court would be required to duplicate the efforts of the state court with the possibility of reaching a different result. See Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1368 (9th Cir. 1990) (quoting American Int'l Underwriters, Inc. v. Continental Ins. Co., 843 F.2d 1253, 1258(9th Cir. 1988)).

Second, the state court action was filed on 10/5/95. The federal action was not filed until 4/3/96. Moreover,

the state litigation has progressed beyond the federal litigation.

Third, plaintiff has offered no reason why the state court cannot adequately protect his rights. See Nakash, 882 F.2d at 1415; see also Martinez v. State of California, 444 U.S. 277, 283 n.7 (1980) (state courts have concurrent jurisdiction over section 1983 claims).

Fourth, the Ninth Circuit has held that "forum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1371 (9th Cir. 1990). This factor is particularly relevant to the present case. First, the demurrer to the First Amended Complaint in state court was sustained on 3/29/96. Only five days later, on 4/3/96, plaintiff filed his substantially similar federal action. In paragraph 19 of the First Amended Complaint, plaintiff alleged, "In causing the filing of the Complaint in the criminal case, defendant JAMES DON BANKHEAD acted as a private citizen and as a candidate for the office of city council, and not in the course of his duties as a member of the Fullerton City Council, and Defendant acted in pursuance of personal motives." Godfrey Request for Judicial Notice, Ex. 1, ¶ 19. In paragraph 35 of the present complaint, plaintiff claims, "In causing the filing of the Complaint in the underlying criminal case, defendant JAMES DON BANKHEAD acted in the course of his duties as a councilmember [sic], but nonetheless for malicious personal purposes and motives." Godfrey Response, Ex. B, ¶ 35. Although pleading essentially the same claims in both the state and federal actions, plaintiff's federal complaint contradicts the state complaint in an effort to invoke this Court's jurisdiction and thereby avoid the state court's adverse ruling.

APPENDIX E

[from Petitioner's OPENING BRIEF]

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APPENDIX F

APPENDIX F

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 17 1997
CATHY A. CATTERSON, CLERK,
U. S. COURT OF APPEALS

WILLIAM SNOW HUME,	)	No. 96-55890
	)	
Plaintiff-Appellant,	)	D.C. No. CV-96-
	)	00322-LHM
v.	)	
	)	
JAMES DON BANKHEAD;	)	
MICHAEL C. MAYNARD;	)	MEMORANDUM*
W. J. WALLIS; JAN FLORY,	)	
a/k/a JANESSE BORIS;	)	
WILLIAM PETER GODFREY;	)	
UNOCAL LAND &	)	
DEVELOPMENT COMPANY;	)	
DENNIS CHAPMAN; DARRYL	)	
WOODS; UNOCAL	)	
CORPORATION; BILL FLORY,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding
Submitted March 11, 1997**

Before: SNEED, LEAVY, and THOMAS, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

William Snow Hume appeals pro se the district court's order staying his 42 U.S.C. § 1983 action pursuant to Colorado River Water Consrvn. Dist. v. United States, 424 U.S. 800, 817-19 (1976). Hume sued defendants for conspiracy, malicious prosecution, and abuse of process. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review for abuse of discretion. Nakash v. Marciano, 882 F.2d 1411, 1413 (9th Cir. 1989). We affirm.

Hume contends that the district court abused its discretion by staying his section 1983 action, pending resolution of Hume's concurrent state court action for conspiracy and malicious prosecution. This contention lacks merit.

A district court may invoke Colorado River deference to state court proceedings only under exceptional circumstances. See Travelers Indem. Co. v. Madonna, 914 F.2d 1364, 1367-68 (9th Cir. 1990); Nakash, 882 F.2d at 1415. Whether exceptional circumstances exist depends upon a consideration of various factors, including whether: (1) federal deference will avoid piecemeal litigation; (2) the state court obtained jurisdiction first; (3) state or federal law controls; (4) the state proceeding will adequately protect the parties' rights; (5) the state and federal proceedings are substantially similar; and (6) the plaintiff is

forum shopping. See Nakash, 882 F.2d at 1415-17.[1] Here, exceptional circumstances exist to support the district court's decision to stay Hume's federal action. First, prosecution of Hume's section 1983 action would likely lead to piecemeal litigation because, at the time Hume filed his federal action, the state court had already dismissed Hume's complaint without leave to amend.[2] Because Hume's federal claims are based primarily upon his state court action for conspiracy and malicious prosecution, see Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995) (stating that a section 1983 plaintiff alleging a due process violation based upon a claim of malicious prosecution must establish the elements of the underlying state tort),[3] the district court's resolution of Hume's federal action would involve "duplicating efforts and possibly

---

[1] Two additional factors, which are not relevant here, are: (1) whether either court has assumed jurisdiction over the res; and (2) the relative convenience of the forums. Id. at 1415.

[2] Hume has appealed this dismissal to the state court of appeal, which has yet to render its decision.

[3] In California, a plaintiff suing for malicious prosecution must demonstrate that the prior criminal action "(1) was commenced by or at the direction of the defendant and was pursued to a legal termination in . . . plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice.,, Bertero v. National Gen. Corp)., 529 P.2d 608, 613-14 (Cal. 1974) (citations omitted).

reaching [a] different result[]" from that of the state court, Madonna, 914 F.2d at 1369. Accordingly, the first two Nakash factors support the district court's decision to stay its proceedings. See Nakash, 882 F.2d at 1415; cf. Madonna, 914 F.2d at 1369-70.

Second, Hume's state and federal actions are substantially similar because the record indicates that the federal litigation is a "spin-off" of Hume' state court action. See Nakash, 882 F.2d at 1416-17. As stated above, resolution of both actions hinges upon the adjudication of Hume's state court conspiracy and malicious prosecution claims. See Freeman, 68 F.3d at 1189; Johnson v. Barker, 799 F.2d 1396, 1399-1401 (9th Cir. 1986). Third, Hume has not demonstrated that the state court cannot adequately protect his rights. See Nakash, 882 F.2d at 1415. Accordingly, the third, fourth, and fifth Nakash factors also support the district court's decision to stay its proceedings. See id. at 1415-17; cf. Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 913 (9th Cir. 1993) (finding that a substantial doubt regarding whether resolution of concurrent state court proceedings would resolve issues raised in the federal action precluded a stay under the Colorado River doctrine).

Finally, the nature and timing of Hume's federal action indicates that Hume impermissibly sought to avoid the adverse state court ruling by forum shopping. See Nakash, 882 F.2d at 1417. Here, the state court dismissed Hume's amended complaint without leave to amend on March 29, 1996. Only five days later, Hume refashioned his state complaint into a nearly identical section 1983 action, and filed the federal complaint on April 3, 1996. Accordingly, we conclude that the last relevant Nakash factor also supports the district court's decision to stay its proceedings. See id.

Because we conclude that the district court properly considered and weighed the relevant Colorado River factors, we hold that the district court did not abuse its discretion by deferring consideration of Hume's section 1983 action, pending resolution of his concurrent state court action. See id. at 1415-17.

AFFIRMED.[4]

[4] We deny Hume's request to take judicial notice of a minute order from Hume's state criminal proceeding, because the document is not directly related to issues presented in this appeal. See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

No. 96-1985

In The Supreme Court Of The United States

OCTOBER TERM 1996

WILLIAM SNOW HUME,
Petitioner,

v.

W.J. WALLIS, MICHAEL C. MAYNARD, JAMES DON BANKHEAD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

RESPONDENT WILLIAM PETER GODFREY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, William Peter Godfrey, respectfully requests that this Court deny the Petition for Certiorari, which seeks review of the Ninth Circuit's decision upholding a stay by the district court under the *Colorado River* doctrine. The Ninth Circuit's decision is an unpublished memorandum opinion reprinted in the Petition for Certiorari at Appendix "F." The district court's ruling is reprinted in the Petition at Appendix "D."

STATEMENT OF THE CASE

Virtually all of the facts of this case are undisputed. The setting is the 1994 city council election in Fullerton, California. In the weeks prior to the election, hundreds of campaign signs of certain candidates began to disappear from both public and private property. Petitioner admitted to local police officers that he had removed many of the campaign signs, asserting he had the legal right to do so because they were posted illegally. Eventually, the district attorney filed a municipal court complaint against Petitioner for misdemeanor vandalism. California Penal Code § 594(b)(4). Approximately one year later, the district attorney requested a dismissal of the complaint, having concluded there was not a reasonable probability of proving the case beyond a reasonable doubt.

On November 2, 1995, Petitioner brought a state court action for malicious prosecution based upon his prosection for the sign removals. *Hume v. Flory, et al.*, Orange County Superior Court, Case No. 755114 (the "state action"). Petitioner initially named six defendants in the state action: Don Bankhead, an incumbent city council candidate whose signs had been removed; Jan Flory and William Peter

Godfrey, non-incumbent council candidates whose signs had been removed; Bill Flory, Jan's husband; Unocal Land and Development Company, from whose property some of the signs had been removed; and Dennis Chapman, a Unocal employee.

After demurrers to the state court complaint were sustained, Petitioner filed a first amended complaint on February 6, 1996, adding a claim for conspiracy and an additional defendant, Vincent Buck, a professor at California State University, Fullerton, who had witnessed Petitioner removing campaign signs from the Unocal property. Demurrers were again sustained, and Petitioner's appeal of the entry of judgment thereon is currently pending.

After the sustaining of the demurrers, Petitioner filed this federal action, again alleging malicious prosecution and conspiracy, this time based upon 42 U.S.C. § 1983, with pendent state claims for abuse of process. In addition to the original six defendants in the state court action, Petitioner added as defendants Unocal Corporation (the parent of Unocal Land and Development Company); Darryl Woods, a member of Unocal's legal department; and Michael Maynard and W.J. Wallis, Fullerton police officers.[1]

---

[1] Michael Maynard was earlier named as a defendant in another federal action filed by Petitioner on October 4, 1995, arising out of the same facts, *Hume v. Maynard, et al.*, SACV 95-849 LHM. This action also named deputy district attorney Guy Ormes as a defendant, and was based upon 42 U.S.C. § 1983, for "unlawful threats" to arrest Petitioner if he continued to remove campaign signs.

The district court, noting certain problems in the complaint herein, issued an order to show cause as to why the complaint should not be dismissed for failure to state a claim. This OSC is attached hereto as Appendix "A." After learning from the parties' briefs that Petitioner's California state action was on appeal, the district court issued a second order to show cause, this time as to why this action should not be stayed "pending finality of the state action." The second OSC is attached hereto as Appendix "B." Thereafter, the district court conditionally stayed all proceedings pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Petition for Certiorari, Appendix "D." The Ninth Circuit upheld this action on appeal. Petition for Certiorari, Appendix "F."

In his Petition, Petitioner argues that the district court (1) failed to address the effect of federal issues in applying the *Colorado River* analysis; (2) did not resolve the issue of whether it had jurisdiction of the case before imposing the stay; (3) did not find that the state and federal actions were truly parallel before granting the stay; and (4) lacked authority to stay this case because Petitioner had reserved his federal claims in the state action under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Petition, p. i.

REASONS FOR DENYING THE WRIT

I. The Lower Courts Did Not Ignore The Effect Of Federal Issues In Applying *Colorado River*.

Petitioner misstates the record in representing in his "first question presented" that in staying this action, the lower courts did not address one of the important factors of the *Colorado River* analysis, that is the presence of federal issues and claims. Petition for Certiorari, p. i. On the contrary, in upholding the district court's original order, the court of appeals specifically references the state versus federal law factor, which it identifies as the "third factor" in the *Colorado River* crucible. Petition for Certiorari, Appendix "F," p. 2. The court expressly states:

> Hume's state and federal actions are substantially similar because the record indicates that the federal litigation is a "spin-off" of Hume'[sic] state court action. . . . As stated above, ***resolution of both actions hinges upon the adjudication of Hume's state court conspiracy and malicious prosecution claims.*** . . . Accordingly, the ***third***, fourth, and fifth *Nakash* [*Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989)] factors also support the district court's decision to stay its proceedings.

Id., p. 4; emphasis added.

The district court was also well aware of the federal issue factor in originally staying the action. The district court notes in its ruling that the claims in both the state and federal actions allege malicious prosecution, and that affirmance of the state court's ruling will have collateral estoppel effect on the federal action. Id., Appendix "D," p. 3. Further, in its previous order to show cause re dismissal, the district court specifically states:

> (1) Malicious Prosecution. "***To state a claim for malicious prosecution under section 1983***, a plaintiff must demonstrate that: (1) ***he has satisfied the requirements of a state law cause of action for malicious prosecution***; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty." *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996).

Appendix "A" hereto, p. 1; emphasis added.

Thus, the lower courts were well aware of the federal issue factor of the *Colorado River* "exceptional circumstances" test, and dutifully weighed this factor in determining to stay this action.

II. The Jurisdiction Of The District Court Was Not Uncertain.

Petitioner also misstates the record in representing in his "second question presented" that the district court had found facts which deprived it of jurisdiction. Essentially, Petitioner argues that abstention in this case was premature because the district court never determined whether it had jurisdiction in the case. According to Petitioner, by issuing an OSC re dismissal, the district court expressed doubts about whether the federal complaint alleged a deprivation of a civil right. Since the district court then stayed the action prior to deciding the dismissal issue, the district court could not have properly believed it had subject matter jurisdiction over the case, and thus it was error to abstain.

This argument is not only frivolous, but places in doubt whether Petitioner brought this action for proper purposes. Petitioner filed this action under 42 U.S.C. § 1983, jurisdiction of which is granted district courts by 28 U.S.C. § 1343(3). Thus, jurisdiction was unquestionably conferred upon the district court unless the constitutional claim was "so attenuated and unsubstantial as to be absolutely devoid of merit," was "obviously frivolous," or was "no longer open to discussion." *Hagans v. Lavine*, 415 U.S. 528, 537, 94 S.Ct. 1372, 39 L.Ed.2d 577, 587 (1974). By advancing his argument that the district court may not have had jurisdiction, Petitioner perforce argues that his § 1983 claim was "obviously frivolous."[2]

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[2] Petitioner's admission also has serious adverse ramifications for him under Federal Rules of Civil Procedure, Rule 11, which provides for sanctions for presenting a complaint for any improper purpose.

Petitioner's argument misapprehends what occurred below. The district court never expressed doubt about its subject matter jurisdiction in its OSC re dismissal. Rather, the court merely stated that the Fourteenth Amendment right to substantive due process did not support a federal claim for malicious prosecution. Assuming, without deciding, that the First and Fourth Amendments may support a federal claim for malicious prosecution, the district court stated that it did not appear that Petitioner had stated facts sufficient to support either a First or Fourth Amendment claim. Appendix "A" hereto.

It is well settled that jurisdiction is ***not*** defeated by the possibility that the averments of a complaint might fail to state a cause of action on which a plaintiff could actually recover. Failure to state a proper cause of action calls for a judgment on the merits, not for a dismissal for want of jurisdiction. *Hagans v. Levine*, 415 U.S. at 542; *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Thus, because the district court's doubt was as to whether the complaint stated a cause of action, rather than as to whether the court had subject matter jurisdiction, Petitioner's argument regarding prematurity falls flat.

III. The State And Federal Court Actions Are "Parallel" Actions.

In his "third question presented," Petitioner erects a straw man argument, ascribing ambiguity where none exists. Essentially, Petitioner claims that "parallel" state and federal cases must exist before a *Colorado River* stay may be

imposed, and that the Ninth Circuit requires mere "similarity" in order to trigger *Colorado River*.

First, nothing in the decisions of this Court mandates that a district court make a formal threshold decision that cases are "parallel" before embarking on an analysis of whether a *Colorado River* stay is appropriate. Rather, in *Colorado River*, this Court "declined to prescribe a hard-and-fast rule for dismissals of this type, but instead described some of the factors relevant to the decision." *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 15, 103 S.Ct. 927, 74 L.Ed.2d 765, 779 (1983).

Nor do the decisions of this Court describe "parallel" actions as requiring *exact* parallelism between the federal and state actions. Rather, the degree of similarity or parallelism required between the actions is a sub-factor of those factors identified by the Court as appropriate for consideration. That is, weighing whether a stay will avoid piecemeal litigation, whether state or federal law controls, whether a litigant has been forum shopping, whether the state court proceedings are adequate to protect the litigants' rights, and whether the state court proceedings will have a *res judicata*/collateral estoppel effect, all inherently consider the parallelism of the state and federal actions. If the state action is not sufficiently parallel or similar to the federal action, the weight of these factors will compel a conclusion that jurisdiction *not* be surrendered.

Both the district court and the court of appeals determined that the state and federal actions were parallel in that they were substantial similar. Indeed, they are. In this federal action, Petitioner alleges that Respondents maliciously prosecuted him, abused process in doing so, and conspired

to commit these tortious acts. This case differs from the state court action only in that Petitioner has added allegations that Respondents' conduct purportedly violated his due process and equal protection rights under the Fourth and Fourteenth Amendments, and his First Amendment rights.[3]

Under California's focus on the "single primary rights theory" for purposes of *res judicata*, however, state law required Petitioner to plead all his theories as to why the Respondents had allegedly violated his rights under the pleaded facts in the state action. As a result, the court of appeal's decision in the state court action will bar this action. *See*, *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 784 (9th Cir. 1986) [*res judicata* bars plaintiff from litigating § 1983 claim in federal court after state court's decision on petition for writ of mandate].

Petitioner's argument that the state and federal actions are not substantially similar because the state and federal parties are not identical is disingenuous. Indeed, Petitioner has been what can only be described as arbitrary and capricious in his naming of defendants. In the related federal

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[3] Petitioner's suggestion that his conspiracy allegations in this action somehow distinguish this case from the state action (Petition, p. 10) is meritless in that civil conspiracy is not an independent cause of action, but rather is a theory of joint liability whereby all who cooperate in another's wrong may be held liable. *Hoffman v. Halden*, 268 F.2d 280, 296 (9th Cir. 1959), *overruled on other grounds, Cohen v. Norris*, 300 F.2d 24, 29-30 (9th Cir. 1962); *Thompson v. California Fair Plan Assn.*, 221 Cal.App.3d 760, 767, 270 Cal. Rptr. 590 (1990). Petitioner's conspiracy claim thus depends upon his malicious prosecution claim.

action filed on October 4, 1995 (*Hume v. Maynard, et al.*, SACV 95-849 LHM, referred to in footnote 1, *supra*), Petitioner named Respondent Maynard and deputy district attorney Ormes as defendants, for unlawful threats of arrest regarding Petitioner's continued removal of campaign signs.

Petitioner then filed his state court action on November 2, 1995, for malicious prosecution based upon his criminal prosecution for sign removal, but did not name either Maynard or Ormes as defendants. Instead, he named six other defendants: Jan and Bill Flory, Don Bankhead, William Peter Godfrey, Unocal Land and Development Company, and Dennis Chapman.

In his first amended state court complaint filed on February 6, 1996, Petitioner added an additional defendant, Professor Vincent Buck.

Finally, in this federal action, Petitioner has named as defendants the original six state court defendants, but has inexplicably dropped Professor Buck and added Detective Maynard (but not deputy district attorney Ormes) from the related federal action. He has also added the Unocal Corporation, Darryl Woods, a Unocal employee, and Detective Wallis, another Fullerton police officer who investigated Petitioner along with Maynard, but who inexplicably was not named in the related federal action.[4]

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[4] Petitioner argues, again disingenuously, that he did not name police officers Maynard or Wallis in the state case because they are immune under state law for malicious prosecution, implying that they are not immune here. Petition for Certiorari, pp. 4, 9. However, Maynard and Wallis are similarly immune from 42 U.S.C. § 1983 liability

This shifting of defendants is inexplicable in light of the fact that the underlying circumstances of all three suits initiated by Petitioner are identical. Moreover, of the ten current defendants in this action, six are the same as in the state action, and another is the same as in the related federal action. Two of the remaining three defendants (Unocal and Woods) are from the corporate parent of an original defendant (Unocal Land and Development Co.), while the last defendant (Wallis) is an employee of the City of Fullerton, the common employer at pertinent times of J. Flory, Bankhead, Godfrey, and Maynard, all of whom Petitioner is now suing in their official capacities, thus involving the common City employer.

A similar attempt to argue that state and federal cases were not substantially similar based upon non-identical defendants was rejected in *Nakash v. Marciano*:

> We should be particularly reluctant to find that actions are not parallel when the federal action is but a "spin off" of more comprehensive state litigation.

882 F.2d at 1417.

Since this action is clearly a "spin off" of the state court malicious prosecution action, Petitioner cannot defeat a *Colorado River* stay by whimsically naming defendants who are not identical to the state court defendants. This is

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for malicious prosecution under *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 42 L.Ed.2d 128, 140 (1976).

especially so when, as here, the added defendants are all substantially related either through their corporate structure or their employment, and all could have been named in the state court action.

Simply stated, the district court and the court of appeals did not abuse their discretion in finding this action substantially similar to the state court action.

IV. Petitioner Failed To Reserve His Federal Claims.

Although Petitioner lists in his Petition for Certiorari a "fourth question presented" (whether a district court may impose a stay where the plaintiff has in the state court reserved his federal claims under *England v. Louisiana State Bd. of Medical Examiners*), inexplicitly Petitioner does not address this question in the body of his Petition. Consequently, it should be deemed waived.

Even were this question considered, however, it is unavailing to Petitioner. Petitioner voluntarily filed his claims in state court on November 2, 1995. Demurrers to the complaint were sustained, the last one without leave to amend on March 29, 1996. It was not until May 28, 1996, however, that Petitioner filed his reservation of federal claims in the state action under the *England* doctrine, two months after the state court had sustained the demurrers to his complaint without leave to amend. This attempted reservation came too late. *Mission Oaks Mobile Home Park v. City of Hollister*, 788 F.Supp.1117, 1123 (N.D. Cal. 1992), *aff'd*, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1052, 127 L.Ed.2d 373 (1994). Because Petitioner failed to adequately reserve his federal

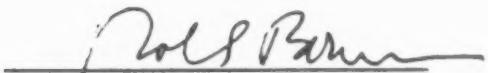
claims, the question presented by Petitioner is not an issue in this case.[5]

CONCLUSION

Supreme Court Rules, Rule 10, provides that a petition for writ of certiorari will be granted "only for compelling reasons." None have been shown here. The ruling of the district court and the unpublished opinion of the court of appeals applied the *Colorado River* factors in accordance with established law in staying this action. The petition for certiorari should be denied.

Respectfully submitted,

RUTAN & TUCKER, LLP



ROBERT S. BOWER
Attorneys for Respondent
William Peter Godfrey

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[5] Petitioner's other assertions regarding conflicts among the holdings of the Circuit Courts on the various points raised in the Petition are generally unfounded. The authorities cited by Petitioner merely reflect differences in the conclusions reached, rather than in the approaches taken or the tests applied.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 96 - 322-LHM (Eex) **Date** 4/17/96

Title Hume v. Bankhead, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, **JUDGE**

Debra Beard	None Present
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: ORDER TO SHOW CAUSE

IN CHAMBERS:

The Court has read and considered the Complaint, which was filed on 4/3/96.

(1) **Malicious Prosecution.** "To state a claim for

malicious prosecution under section 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty." Reed v. City of Chicago, 77 F.3d 1049, 1051 (7th Cir. 1996).

Hume's complaint alleges deprivations of his First, Fourth and Fourteenth Amendment rights. See Complaint, ¶¶ 46, 51. However, the Fourteenth Amendment right to substantive due process does not support a federal claim for malicious prosecution. Singer v. Fulton County Sheriff, 63 F.3d 110, 114 (2nd Cir. 1995) Moreover, assuming without deciding that the First or the Fourth Amendments support a federal claim for malicious prosecution, plaintiff does not appear to have stated facts sufficient to support either a First Amendment or a Fourth Amendment claim.

Additionally, it appears from the face of the complaint that the many of the named defendants were not state actors.

(2) **Order to Show Cause Re: Dismissal of Malicious Prosecution Claims.** For the reasons discussed in ¶ 1 above, plaintiff is ordered to show cause in writing: (1) why his first three claims for malicious prosecution should not be dismissed for failure to state a cause of action under federal law and (2) why the claims against each named defendant should not be dismissed for failure to state facts sufficient to show that each defendant was a state actor.

APPENDIX A

(3) **Abuse of Process.** The same limits that apply to section 1983 claims based on malicious prosecution also apply to claims based on abuse of process. See Kleiss v. Short, 805 F.Supp. 726 (S.D. Iowa 1992)

Additionally, Hume's fourth claim for abuse of process appears to be based solely on California law. See Complaint, ¶67.

(4) **Order to Show Cause Re: Dismissal of Fourth Claim for Abuse of Process.** For the reasons discussed in ¶¶ 1 & 3 above, plaintiff is ordered to show cause in writing: (1) why his fourth claim for abuse of process should not be dismissed for failure to state a cause of action under federal law and (2) why the claims against each named defendant should not be dismissed for failure to state facts sufficient to show that each defendant was a state actor.

(5) **Order to Show Cause Re: Dismissal of Supplemental State Law Claims.** Plaintiff is ordered to show cause in writing why his fifth and sixth claims for abuse of process, which are supplemental state law claims, should not be dismissed pursuant to 28 U.S.C. § 1367(c).

(6) **SCHEDULE:**

4/24/96 Plaintiff's response to OSC to be filed with copy faxed to defendant

5/2/96 Defendants replies to be filed with copies faxed to plaintiff.

APPENDIX A

5/7/96 Plaintiff to file and serve Reply.

(7) The court will rule based on the papers submitted by the parties unless otherwise ordered. F.R. Civ. P. 78; Local Rule 7.11

(8) Defendants may specially appear in order to response to this OSC.

THE DATES ORDERED BY THE COURT HAVE BEEN SET ON THE COURT'S CALENDAR AND ARE FIRM DATES

COURTESY COPIES OF ALL DOCUMENTS MUST BE DELIVERED OR SENT BY FACSIMILE TO CHAMBERS OF JUDGE MCLAUGHLIN BY 12:00 NOON ON THE DATE DUE.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 96 - 322-LHM (Eex) **Date** 5/10/96

Title Hume v. Bankhead, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, **JUDGE**

Debra Beard	None Present
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: (1) OSC RE: STAY
(2) CONTINUANCE OF 4/17/96
OSC AND MOTIONS TO DISMISS

IN CHAMBERS:

(1) The Court has read and considered the parties' responses to the OSC issued on 4/17/96 and the papers

filed in connection with the defendants' motions to dismiss. The defendants' papers indicate that plaintiff filed a substantially similar action in the Orange County Superior Court against many of the defendants to this action: Hume v. Flory, Orange County Superior Court Case No. 755114. See OSC Reply of Bankhead, Maynard, Wallis, Godfrey, and Jan Flory, 4 n.1; Godfrey's OSC Reply, 4.

(2) **OSC Re: Stay.** Defendants are ordered to show cause in writing no later than **5/17/96** why the present action should not be stayed pending finality of the state court action.

Plaintiff's reply is to be filed no later than **5/24/96**.

(3) **Continuance.** The Court's 4/17/96 OSC and the motions to dismiss are continued.

(4) The Court will rule based on the papers submitted by the parties unless otherwise ordered. Fed. R.Civ. P. 78; Local Rule 7.11.

COURTESY COPIES OF ALL DOCUMENTS MUST BE DELIVERED OR SENT BY FACSIMILE TO CHAMBERS OF JUDGE MCLAUGHLIN BY 12:00 NOON ON THE DATE DUE.

Supreme Court, U.S.
FILED
AUG 19 1997
CLERK

(3)

No. 96-1985

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WILLIAM SNOW HUME,
Petitioner,

VS.

W. J. WALLIS, MICHAEL C. MAYNARD,
JAMES DON BANKHEAD, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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10 pp

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No. 96-1985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WILLIAM SNOW HUME, *Petitioner*

v.

W. J. WALLIS, MICHAEL C. MAYNARD, JAMES DON BANKHEAD, *ET AL.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent GODFREY, in an apparent change of heart, has filed a Brief in Opposition[1]. Respondent GODFREY has introduced new matters that demand refutation.

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[1] Petitioner asks the Court to observe the "Appearance Form/ Waiver" filed at 2:06 PM on June 24, 1997, by Harold W. POTTER of the Law Office of Richard D. Jones, in which POTTER asks the Clerk to "enter [his] appearance as Counsel of Record for ... respondent[] ... William Peter Godfrey," and in which he states that he "do[es] not intend to file a response to the petition for a writ of certiorari."

I. Respondent GODFREY has introduced falsities in his "Statement of the Case" and elsewhere.

Petitioner will address the falsities *seriatim*, as these appear.

Firstly, GODFREY says in his Brief at page 1 that Petitioner made certain admissions, "asserting he had the legal right to do so because they were posted illegally." That is false. Both the state and federal complaints assert that the right arose because the signs were posted in *criminal trespass* and were *public nuisances as a matter of law*. The District Attorney repeatedly has admitted that he will not prosecute removals of trespassory signs, and he ceased the prosecution of the Petitioner when he concluded that the subject signs were in criminal trespass, as Petitioner had steadfastly maintained. The gravamen of the causes of action sounding in malicious prosecution is that respondent GODFREY lied, and got certain other respondents to lie for him, in order to conceal that his signs had been placed in criminal trespass. For the same reasons as just cited, GODFREY's footnote 1 at his Brief is similarly misleading.

Secondly, GODFREY says in his Brief at page 2 that defendant Unocal had property "from [which] some of the signs had been removed." That is a lie. The precise lie that GODFREY and his coconspirators perpetuated in the underlying criminal prosecution was that Unocal had any possessory right in the subject property whatsoever.

Thirdly, GODFREY says in his Brief at page 2 that "Petitioner filed this federal action... with pendent state claims for abuse of process." That is a half-truth. The fifth and sixth counts were, indeed, pendent state claims. But the fourth count was for "Conspiracy to Abuse Process Under Color of Law," and contained special additional allegations at paragraphs 79, 80 and 81 that clarify why there was "state

action" that is actionable under 42 U.S.C. § 1983.

Fourthly, Petitioner did not **merely** state in his Petition that "the district court... did not resolve the issue of whether it had jurisdiction of the case before imposing the stay." (*See* GODFREY's Brief, page 3 ¶ 2 and page 6 ¶ 1, second sentence.) Rather, Petitioner has continuously **additionally** maintained throughout the appeal and this Petition that the district court's *findings* preclude it from exercising jurisdiction over at least some of the counts in the case[2].

Turning to Godfrey's "Reasons for Denying the Writ":

Fifthly, GODFREY states at page 9 of his Brief that "[t]his case differs from the state court action only in that Petitioner has added allegations that Respondents' conduct purportedly violated his [constitutional] rights." In fact, Petitioner did not plead in his state court action any of the facts pertinent to the counts sounding in abuse of process. Most importantly, Petitioner could not have pleaded the facts about respondent BANKHEAD's activities in his course of duties as a public official; consequently, GODFREY observations at his footnote 3 are again misguided.

Sixthly, GODFREY states at page 12 of his Brief that "[d]emurrers to the complaint [in the state action] were sustained, the last one without leave to amend on March 29, 1996." That is a lie. The state court never even heard the

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[2] Recently Petitioner has found authority to the effect that a federal court is encouraged to use Fed. Rule Civ. Proc. 21 to dismiss parties, in order to preserve jurisdiction. *Varley v. Tampax, Inc.*, 855 F.2d 696, 701 (10th Cir. 1988)(citing *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579). By analogy, a district court ought to immediately dismiss those causes of action over which it does not have jurisdiction (according to the facts it finds), in order that it not defer its jurisdiction over the remainder of a case. (*Compare* Petition, page 19.)

Unocal demurrers until May, 1996; his ensuing comment about "two months after the state court etc." are thus partly false.

II. Respondent GODFREY wrongly cites *Hagans* in his attempt to assert that a pleading's "failure to state a claim" never defeats a court's jurisdiction, and instead always goes to the merits of the case.

Respondent GODFREY says that it "is well settled that jurisdiction is *not* defeated by the possibility that the averments of a complaint might fail to state a cause of action on which a plaintiff could actually recover." His Brief, p. 7, citing *Hagans v. Levine*, 415 U.S. 528 at 542 (1974). But the rule from *Hagans* applies to failure to state acts constituting **deprivations** rather than failure to state a constitutionally protectable **right**. *Cf. Hagans, supra*, 415 U.S. at 539.

The failure to plead an enforceable right goes to jurisdiction, rather than the merits. Thus the failure to plead the existence of a *bona fide* contract or contract right defeats federal jurisdiction based upon impairment of contracts. *City of New Orleans et al. v. New Orleans Waterworks Co. et al.*, 142 U.S. 79, 88 (1891); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 576 (1904). Correspondingly, adequate pleading of a **right** to engage in interstate commerce goes to the federal court's jurisdiction, whereas the pleading of the deprivation of that right goes to the merits. *Weiland v. Pioneer Irrig. Co.*, 259 U.S. 498, 501 (1922).

Similarly, in a civil rights suit, the failure to state an enforceable **right** goes to jurisdiction, while the failure to state a **deprivation** goes to the merits and is properly the subject of a demurrer (in traditional common law pleading). *Swafford v. Templeton*, 185 U.S. 487, 493 (1902). Nothing stated in *Hagans, supra*, conflicts with this proposition.

Unless there is a violatable/ deprivable federal right placed at issue in the pleadings, there is no federal subject matter jurisdiction, as the preceding cases make clear. In the instant case, the district court below never decided whether or not there was pleaded a federally protectable right that could even be violated through a malicious prosecution or abuse of process. See GODFREY's Appendix A, at his Brief. The district court simply never resolved this threshold issue which governs the existence of its subject matter jurisdiction. Its jurisdiction uncertain, it should not have proceeded to an abstention analysis.

Finally, Respondent GODFREY has confused the issue of the *uncertainty* of jurisdiction, caused by lack of resolution of whether the complaint "failed to state an enforceable federal right," with the *impossibility* of jurisdiction, caused by the court's finding of facts about the Petitioner's purported motivations for alleging that respondent BANKHEAD acted in the course of his duties[3].

III. The available authority is against respondent GODFREY's assertion that Petitioner has waived his fourth "question presented."

Respondent GODFREY says at page 12 of his Brief that, because Petitioner did "not address the fourth question in the body of his Petition... it should be deemed waived."

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[3] It is notable that respondent GODFREY did not even address the effect of the *Stitch v. City of Fullerton, James Don Bankhead* suit. (*See* Petition for Certiorari, pp. 4-5.) No doubt this is because respondent GODFREY, like his corespondents BANKHEAD and JAN FLORY AKA JANESSE BORIS, is getting his legal fees in the instant suit paid for by the City of Fullerton.

One of the few treatises concerning practice before the U.S. Supreme Court states that

> [i]f the case contains an issue that is considered not certworthy in and of itself, but on which petitioner believes there is a good argument on the merits, it may be included among the Questions Presented. Not every important issue in a case need have a corresponding reason for seeking review thereof.

STERN, GRESSMAN, SHAPIRO and GELLER, *Supreme Court Practice*, 7th Ed., 337.

The question about the effect of an *England* reservation of federal claims upon a *Colorado River* stay analysis may or may not merely be a question that is "fairly included" in the third question presented. Certainly prospective claim preclusion, and the effect of an *England* reservation thereupon, would affect a *Colorado River* analysis, if the analysis presumes the common law criteria for the "plea in abatement for another action pending."

On the other hand, if the Supreme Court decides that a *Colorado River* stay may be imposed even where a "substantially similar" (as opposed to "parallel" or "concurrent") state court case will not dispose of all of the federal causes of action, nonetheless the Supreme Court may decide that the *England* reservation of federal claims itself is an act that bears upon the "factor" of the federal court's obligation to immediately take active jurisdiction. The Supreme Court has written that "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 at 813 (1976). Which

"important countervailing interest[s]" might be served when an *England* reservation has permanently removed that cause of action from the state court's jurisdiction? This latter issue is not "fairly included" in the third question.

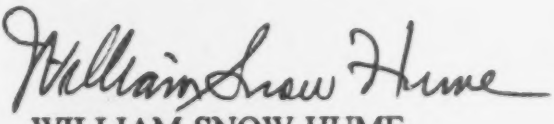
Petitioner will accordingly not presume whether or not this Court would find that the fourth "question presented" merits review in its own right.

IV. Conclusion

In his Brief, respondent GODFREY has misrepresented the law of too many federal cases to permit discussion within the page limits for a reply brief. Petitioner assumes that this Court's clerks will check all authorities and eventually find these misrepresentations, just as the District Attorney eventually discovered that respondent GODFREY misrepresented facts as a witness in the underlying criminal case. Petitioner hopes that it may suffice that he has pointed out the misrepresentations of fact in GODFREY's Brief in Opposition.

The circuit courts of appeal are now fully split on several *Colorado River* doctrinal issues, all pertaining to the important matter of a federal court's obligation to take jurisdiction. Petitioner again urges this Court to grant his Petition for Certiorari.

Respectfully submitted,



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